IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-562

ROSEBUD SIOUX TRIBE,
Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,
Respondents.

BRIEF AMICI CURIAE FOR THE ARAPAHOE TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES, THE CROW TRIBE, THE HOOPA VALLEY TRIBE, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, [redacted]

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STATEMENT OF INTEREST

The tribal entities filing this brief, the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Crow Tribe of the Crow Reservation, Montana, the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, are federally recognized Indian tribes which reside upon and govern their members on their respective reserva-

tions. The National Congress of American Indians is a non-profit association of some 147 Indian tribes organized to promote the interest of American Indians. Petitioner and respondents have consented to the filing of this brief, as evidenced by appropriate letters of consent which have been filed with the Court.

The question of the continued existence of the established boundaries of Indian reservations and of the ability of Indian tribes to exercise jurisdiction over the property and members of their reservation is important to all American Indian tribes, some of whose reservations might be affected by the decision of this Court.

ARGUMENT

1. The Decision In Any Case Involving The Disestablishment Of An Indian Reservation Must Be Guided By The Principles Of Federal Power of Pre-Emption.

In *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)[1] the Court seemed disposed to view its task in cases questioning the continued existence of Indian reservation status as one confined to an analysis of an ancient act of Congress and the circumstances surrounding its enactment. *DeCoteau* v. *District County Court, supra* at 445. It is not surprising, therefore, that in decisions subsequent to *DeCoteau*, the lower courts set their focus on isolated statutes to support determinations of reservation status.[2]

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[1] Together with *Erickson* v. *United States ex rel. Feather*, No. 73-1500.

[2] Pending cases challenging the continued existence of Indian reservations are *United States* v. *Bird Horse* (No. 76-1344), together with *United States* v. *Long Elk* (Nos. 76-1385/1391) (8th Cir.), (the Standing Rock Reservation of North and South Dakota); *United States ex rel. Cook* v. *Parkinson*, 525 F.2d 120 (8th Cir. 1975), petition for writ of *certiorari* pending, No. 75-5867 (Pine Ridge Reservation, South Dakota); *Stanley* v. *Waddell*, Supreme Court, State of South Dakota (Cheyenne River Reservation, South Dakota).

These subsequent decisions, in the opinion of your *amici*, result from a general misunderstanding of the scope and sweep of federal power over Indian affairs.

The United States exercises plenary and exclusive power over Indian affairs by virtue of the power of pre-emption. *Bryan* v. *Itasca County*, —— U.S. ——, 96 S.Ct. 2102, 2105 n.2 (1976); *Moe* v. *Confederated Salish and Kootenai Tribes*, —— U.S. ——, 96 S.Ct. 1634, 1641-42 n.13 (1976); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973).

Federal plenary or pre-emptive power, therefore, is the basis of Indian law. Any review of the current status of those subject to that power must take into account that the federal policy towards Indians has fluctuated between hostility, neglect, beneficient protection, and self-determination. For example, the congressional policy on allotments, found in the General Allotment Act of 1887, "was repudiated in 1934 by the Indian Reorganization Act. . . ." *Mattz* v. *Arnett*, 412 U.S. 481, 496 n.18 (1973), quoted in *Moe* v. *Confederated Salish and Kootenai Tribes, supra* at 1644.

In 1954, there was a congressional policy to terminate federal supervision and control over Indian affairs on certain reservations[3] and Congress included within the ambit of its policy at that time the Menominee Tribe of Wisconsin. Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. § 891 *et seq.* However, 19 years later Congress reversed that policy and undid Menominee termination by the Act of December 22, 1973, 87 Stat. 770, 25 U.S.C. § 903 *et seq.*[4]

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[3] *See, e.g.*, Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 *et seq.*

[4] Congress reasserted federal jurisdiction because of the disastrous effects termination had on the Menominees. *See generally*

Similarly Congress, by the Act of August 15, 1953, 67 Stat. 588, 28 U.S.C. § 1360, permitted states unilaterally to extend criminal jurisdiction over Indians on reservations. Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162. However, 15 years later, by the Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. § 1321-22, Congress amended the earlier act, reversed its policy, and conditioned any extension of state jurisdiction on consent by the Indians. *See Bryan* v. *Itasca County, supra.*[5]

Therefore, in any case involving the status of a reservation, it is necessary to review not only the intent of Congress behind the specific legislation that allegedly resulted in disestablishment, but also how Congress continued thereafter to exercise its plenary power toward that reservation.

2. Federal Plenary Power Over Indian Affairs Requires A Review Of The Contemporary As Well As Historical Facts In Determining If A Reservation Is Disestablished.

Your *amici*, therefore, suggest that in any case involving a question of reservation status, two investigations must be made. The first is to determine whether or not the congressional act alleged[6] to have disestablished the

S. Rep. No. 93-604 and H.R. Rep. No. 93-572, 93d Cong., 1st Sess. (1973). As stated in the Senate Report at page 3, termination of federal supervision "brought the Menominee people to the brink of economic, social, and cultural disaster."

[5] *See also* cases such as *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-66 (1949), and *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 717-18 (1943), which have held that Congress may, by affirmative action, withdraw lands previously held subject to state taxation, and thereupon create specific tax immunities for the benefit of the subsequent Indian grantee.

[6] Inevitably the dispute is between an Indian and a State or one of its political subdivisions. *See, e.g., DeCoteau* v. *District County Court, supra* (state jurisdiction over neglected children), and, *Erickson* v. *United States ex rel. Feather*, companion case (state criminal jurisdiction over Indians); *Mattz* v. *Arnett*, 412 U.S. 481 (1973) (state jurisdiction over Indian fishing rights); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962) (state criminal jurisdiction over Indians).

reservation does in fact evidence the required clear intent on the part of Congress. *United States* v. *Celestine*, 215 U.S. 278 (1909). If so, then a second inquiry must be made to determine if Congress, in the continuing exercise of its plenary power over Indian affairs, either *de facto* or *de jure* changed its policy, as it can and so often does, and reversed its earlier decision to disestablish the particular reservation. This inquiry is necessary because a congressional decision at the turn of the century to disestablish a reservation is not an irrevocable death warrant.

The Court apparently has left the door open to this type of inquiry. In *DeCoteau* v. *District County Court, supra*, the Court did not treat the question of reservation status against the background of federal pre-emption or Congress' continuing power over Indians, and the Court stated: "But we cannot rewrite the 1889 Agreement and the 1891 statute." (420 U.S. at 447.) Review of the full course of congressional policy towards Indians and their reservations does not, of course, require a rewriting of a statute by the Court, but a determination whether Congress rewrote it. To the extent the Court in *DeCoteau* did look to subsequent federal policy, the Court addressed the question of who had been exercising jurisdiction over the area in dispute and noted that "state jurisdiction over the ceded . . . lands went virtually unquestioned until the 1960's." (420 U.S. at 442.) Then, in reviewing the prior holding in *Mattz* v. *Arnett, supra*, the Court noted in connection with the statute under consideration in *Mattz* that the Department of Interior consistently regarded the Klamath River Reservation as a continuing

one, despite the 1892 legislation,[7] while in the *DeCoteau* case before it "the surrounding circumstances are fully consistent with an intent to terminate . . . and inconsistent with any other purpose. (420 U.S. at 448).

Mattz too demonstrated an openness to subsequent inquiry when the Court noted[8] that "[a]lthough subsequent legislation usually is not entitled to much weight in construing earlier statutes . . . it is not always without significance. . . ." citing *Seymour* v. *Superintendent*, 368 U.S. 351, 356-57 (1962). (412 U.S. at 481 n.25). The task of subsequent inquiry urged by your *amici*, however, would not address the understanding by a later Congress of an earlier enactment, but would address any revised policy of Congress and its effect.

Your *amici* suggests, therefore, that congressional policy towards Indians, their affairs and their lands, must be reviewed in questions involving the status of a reservation, as that policy is reflected in congressional acts and administrative actions that are implied or explicitly approved by Congress.

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[7] The Court stated in *Mattz, supra* at 505:

> "Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of Interior and by Congress. In 1904 the Department, in *Crichton* v. *Shelton*, 33 I.D. 205, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation, and it continues to do so today. And Congress has recognized the reservation's continued existence by extending the period of trust allotments for this very reservation by the 1942 Act, described above, 25 U.S.C. § 348(a), and by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act, *supra*." (Footnotes omitted).

[8] *Mattz* v. *Arnett, supra* at 505 n.25.

CONCLUSION

For the reasons stated, your *amici* respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit as urged by petitioner. In the alternative, your *amici* respectfully suggest that the decision below be vacated and the case remanded in order for the Court below to consider fully any and all congressional action relating to the Rosebud Indian Reservation subsequent to enactment of the three settlement acts in issue.

Respectfully submitted,

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